United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

No. 75-6043 75-6043

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LAURENCE F. KELLY, as Administrator of the Estate of RICHARD C. KELLY,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
FILED
SEP 11 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

BRIEF FOR DEFENDANT-APPELLEE

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

LAURENCE F. KELLY, as Administrator of the Estate of RICHARD C. KELLY,

Plaintiff-Appellant,

v.

Docket No. 75-6043

UNITED STATES OF AMERICA,

Defendant-Appellee.

BRIEF FOR DEFENDANT-APPELLEE

FACTS

Plaintiff is administrator of the estate of Richard C. Kelly who drowned on September 4, 1970, in the waters of Lake Ontario when the boat in which he was sailing capsized "two or three miles offshore," (Appendix, p. 1).

Charging negligence, plaintiff filed a claim for administrative settlement with the Coast Guard on August 31, 1972 (plaintiff's brief, p. 2). The claim was denied by the Coast Guard on October 30, 1972, (ibid). Plaintiff filed a complaint in the federal district court of the Northern District of New York on March 13, 1973, ibid. It was dismissed by order of that court, Edmund Port, J., for lack of jurisdiction by reason of time bar on April 14, 1975.

QUESTION PRESENTED

As stated by plaintiff, whether he has a remedy under the Federal Tort Claims Act or whether his only remedy is under the Suits in Admiralty Act (in which case the complaint is time-barred).

ARGUMENT

Preliminarily we note that plaintiff's contention that the Coast Guard was under a duty to rescue (plaintiff's Point I) is wide of the mark.[1/] Plaintiff's suit against the United States is time-barred. In support we note three considerations which are all that are conceivably relevant in this appeal. These are: (I) A suit for death as a result of a boating accident on the Great Lakes presents a claim exclusively for admiralty's jurisdiction; (II) such a suit against the United States can only be brought under the Suits in Admiralty or the Public Vessels Acts; and (III) Plaintiff's suit is time-barred because not brought within the two years limitations period

1/ It's certainly not within the scope of what plaintiff says is the "Question Presented", Appellant's Brief, p. 2. Nevertheless, there is no affirmative duty on the part of the Coast Guard to rescue. Foltting v. Kaevando, 324 F. Supp. 585, 587 (S.D. Tex. 1971); Frank v. United States, 250 F. 2d 178, 180 (3rd Cir. 1957), cert. den. 356 U.S. 962 (1958); Lacey v. United States, 98 F. Supp. 219 (D. Mass. 1951). And see the decision on appeal of the case quoted by plaintiff at pp. 3-4 of its brief, United States v. Sandra and Dennis Fishing Corporation, 372 F. 2d 189 (1st Cir. 1967), cert. den. Roberts v. United States, 389 U.S. 836 (1967).

of that Act. These considerations are addressed in that order.

I. A Claim for Wrongful Death as a Result of a Boating Accident on Lake Ontario Can be Heard only in Admiralty.

On the last page of his brief plaintiff cites Crosson v. Vance, 484 F. 2d 840, a recent decision of the Fourth Circuit denying that admiralty has jurisdiction of a claim for personal injury by a water skier against the allegedly negligent operator of the tow boat. The court stated that its conclusion was mandated by the Supreme Court's treatment of a similar water skiing case cited in Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972). The Fourth Circuit viewed as open the question whether Executive Jet would foreclose resort to admiralty in any case involving the operation of small pleasure craft.

Relying on Crosson and another Fourth Circuit decision involving injury to a swimmer in Lake Murray, Onley v. South Carolina Electric and Gas Company, 488 F. 2d 758 (1973), the Eastern District of Virginia dismissed for lack of jurisdiction in admiralty an action brought for death as a result of a pleasure craft explosion on Lake Gaston. King v. Harris-Joyner Co., 384 F. Supp. 1231 (1974). And in Adams v. Montana Power Company, 354 F. Supp. 1111 (D. Mont. 1973) aff'd, Docket No. 73-1871 (9th Cir. June 27, 1975) death by drowning from the capsizing of a small pleasure boat in a dam on the Missouri River[2/] was

2/ "The stretch of river on which the accident occurred is twenty-five miles long, wholly in Montana, and completely obstructed by Hauser dam at one end and by Holter dam at the other. The trial court found that only non-commercial fisherman, water skiers, and pleasure boaters made use of the river." (Ninth Circuit slip op. at 1-2).

held outside admiralty jurisdiction. These are the only cases we know of since Executive Jet holding that torts in connection with pleasure craft are not to be treated in admiralty.

In this case, however, we are dealing, not with Lake Gaston or Lake Murray or with a locked-in stretch of an otherwise navigable river, but with Lake Ontario[3/]. This would make all the difference to the Federal District Court of Montana which quotes the language cited in the preceding footnote and to the Ninth Circuit, which says that "admiralty jurisdiction need and should extend only to those waters traversed or susceptible of being traversed by commercial craft." Slip op. at 3. And at fn. 4, slip op. 5, the court concedes that "Where commerce moves and the waters are legally navigable, there may be a federal interest in extending admiralty jurisdiction to pleasure craft. See St. Hilaire Moye v. Henderson, 496 F. 2d 973 (8th Cir. 1974)." In the case cited injury as a result of smallboat operations on the Arkansas River resulted in admiralty jurisdiction. In another post-Executive Jet decision the Fifth Circuit agrees. Injury suffered by poachers in a 15-foot outboard on the Mississippi from shotgun fire ashore was held cognizable in admiralty.

3/ "These lakes are in truth inland seas. Different states border on them on one side, and a foreign nation on the other. A great and growing commerce is carried on upon them between different states and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them, and prizes been made; and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas, applies with equal force to the lakes."

The Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851).

"Admiralty has traditionally been concerned with furnishing remedies for those injured while travelling navigable waters", Kelly v. Smith, 485 F. 2d 520, 526 (5th Cir. 1973). In Banchi v. Miller, 388 F. Supp. 645 (E.D. Pa. 1974) suit for deaths sustained while fishing in defendant's outboard was properly brought in admiralty. "Merely because defendant's vessel was not engaged in maritime commerce is not controlling." Id. at 646. In Oppen v. Aetna Ins. Co., 485 F. 2d 252 (9th Cir. 1973) physical damage to pleasure boats from the oil spill in Santa Barbara Channel was the proper subject of admiralty jurisdiction.

The Supreme Court's decision in Executive Jet contains no suggestion that pleasure boating is not admiralty or that its prior decisions relative to pleasure craft are overruled. See Levinson v. Deupree, 345 U.S. 648 (1953); (a suit for wrongful death resulting from collision of two motor boats on the Ohio River is in admiralty); and Coryell v. Phipps, 317 U.S. 406 (1943); (a yacht owner is entitled to limitation of liability under 46 U.S.C. §183, a remedy peculiarly admiralty's, when he has no knowledge of defects in the yacht).

The foregoing distinctions are warranted but perhaps unnecessary. The test of Executive Jet is that "the wrong bear a significant relationship to traditional maritime activity." 409 U.S. at 268. Put that way it is almost inconceivable that the action of the Coast Guard in connection with a rescue on the Great Lakes is not related to traditional maritime activity.

II. A Claim of Maritime Tort can be Prosecuted Against the United States only Under the Suits in Admiralty or Public Vessels Acts

The complaint charges that the Coast Guard's nonfeasance or misfeasance ashore (in failing to send out a rescue boat) resulted in the death by drowning of plaintiff's intestate. Thus, because "the substance and consummation" of the tort alleged took place on the water, the jurisdiction is in admiralty, The Plymouth, 70 U.S. (3 Wall.) 20, 35 (1866). "[W]hen the negligent act originates on land and the damage occurs on water, the cause of action is within the admiralty jurisdiction..." In re Motorship Pacific Carrier, 489 F.2d 152, 157 (5th Cir. 1974). And see Oppen v. Aetna Ins. Co., 485 F. 2d 252, 256 (9th Cir. 1973); Weinstein v. Eastern Airlines, Inc., 316 F. 2d 758, 765 (3rd Cir. 1963); Utzinger v. United States, 246 F. Supp. 1022 (S.D. Ohio 1965); Wilson v. Transocean Airlines, Inc., 121 F. Supp. 85, 92 (N.D. Calif. 1954); Smith v. Lampe, 64 F. 2d 201, 202 (6th Cir. 1933).

The United States can be sued in admiralty only under the Suits in Admiralty Act, 46 U.S.C. §§741-752 (SIA) or the Public Vessels Act, 46 U.S.C. §§781-790 (PVA). T.J. Falgout Boats, Inc. v. United States, 361 F. Supp. 838, 839 (C.D. Cal. 1972) aff'd., 508 F. 2d 855, 856 (9th Cir. 1975); Roberts v. United States, 498 F. 2d 520, 525 (9th Cir. 1974) cert. den. 419 U.S. 1070 (1974).

But plaintiff says that his remedy is under the Federal Torts Claims Act (FTCA). It is true that before 1960 actions of an admiralty nature were brought under that act when no Government vessels or cargoes were involved. This is because 46 U.S.C. §742 (a provision of SIA) was stringently limited to

vessels and cargoes as the first sentence of the former version of the statute shows:

> In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against any corporation mentioned in section 741 of this title, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation.

On September 13, 1960, however, the proviso of that sentence was stricken and the following words (emphasized) were added so that the new statute now reads:

> In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, <u>or if a private person or property were involved</u>, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in section 741 of this title.

Plaintiff says that the new language wrought no significant changes and that he is still entitled to sue here under the FTCA. Judge Austin's decision in the <u>Peterson</u> case is cited in support. Parenthetically we wish to note that it is the only one which could be. Further, Judge Austin's decision was rendered on a government motion to dismiss and as the case was subsequently tried - and judgment given for the United States - the decision was never tested on appeal. As against that lone case authority[4/] the following decisions should be noted.

4/ Jayson on Personal Injury is also cited in support. But how Jayson - or plaintiff either - expect to prove their point by citing a case - <u>Moran</u> v. <u>United States</u>, (Plaintiff's Brief. p. 6) which was decided in 1951, nine years before the statute was amended, is not readily perceived.

Roberts v. United States, supra,

was a wrongful death action arising out of the crash of a cargo plane off Okinawa assertedly as a result of the negligence of Air Force personnel. The discussion of the Ninth Circuit relative to our problem can be set out in full at this point:

> The District Court, believing that the admiralty statutes extended only to claims involving United States vessels or cargo concluded that the appellees' maritime claim was maintainable solely under the FTCA. Prior to 1960, this interpretation of the intersecting scope of the statutes would have been correct. However, in 1960, Congress amended section 742 of the SIA by deleting the language which restricted the statute to claims involving merchant vessels and by substituting a broad new jurisdictional statement:
>
> > "In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States. . . ." Pub. L. No. 86-770, § 3, 74 Stat. 912. (Emphasis added)
>
> The addition of the phrase "or if a private person . . . were involved" has been interpreted by a majority of courts as a legislative attempt to bring all maritime torts asserted against the United States within the purview of the SIA. See De Bardeleben Marine Corp. v. United States, 451 F.2d 140 (5th Cir. 1971); Richmond Marine Panama, S. A. v. United States, 350 F.Supp. 1210, 1219-1220 (S.D.N.Y.1972); Tankrederiet Gefion A/S v. United States, 241 F. Supp. 83 (E.D.Mich.1964); Contra, J. W. Petersen Coal & Oil Co. v. United States, 323 F.Supp. 1198 (N.D.Ill.1970). Moreover, this expanded interpretation of the SIA appears to conform with retrospective Congressional understanding of the Act, as the court in Richmond Marine Panama, S. A. v. United States, supra,

notes:

> "Although subsequent Congressional explanation of the meaning of a statute is not binding on the courts, it is interesting to note, nevertheless, that a Senate Report of August 17, 1972 explained that the 1960 amendment extends jurisdiction under the Suits in Admiralty Act 'to the full range of admiralty cases which might have been maintained had a private person or property been involved rather than the Government or its agents and employees or property.' Senate Report No. 92-1079, 92d Cong., 2d Sess., 1972, 9 U.S. Code Cong. and Admin. News. pp. 4045, 4050." Id. 350 F. Supp. at 1220, note. 5/
>
> (at 525-526).

In DeBardeleben Marine Corp. v. United States, 451 F. 2d 140 (1971) the Fifth Circuit, citing the legislative history of the amendment, S. Report No. 1894, 86 Cong. 2d Sess., 1960 U.S. Code Congressional and Administrative News, p. 3583, said that the purpose of the amendment was "to assimilate the Government to the private person in relation to any or all transactions giving rise to liability in the Admiralty," (at 145). As a private cartographer would be liable "for maritime injuries from the negligent publication of a marine chart" (ibid.) so would the U.S.; under the amendment Congress eliminated "the historic restriction of SIA-PVA

5/ The bound volumes of Congressional and Administrative News set forth the Senate Report cited at 1972 U.S. Code Cong. and Admin. News, pp. 3129, 3134.

liability to noncontractual claims relating to ships and cargo." (ibid.). In this Circuit the Southern District of New York held that the revision of Section 742 "included maritime claims where no vessel was involved." See Richmond Marine Panama S. A. v. United States, 350 F. Supp. 1210, 1220 (1972). So, suits charging negligence of the Coast Guard in maintaining positions of buoys are properly brought under the Suits in Admiralty Act, id. at 1212; Afran Transport Company v. United States, 309 F. Supp. 650, 652 (S.D.N.Y. 1969), aff'd., 435 F.2d 213 (2d Cir. 1970); Wilcox v. United States, 1964 A.M.C. 1206 (S.D.N.Y. 1964), the decision pointing out that before the 1960 amendment such a suit could have been brought against the Government under the FTCA. If no vessel is involved and the negligence is only "that of a shore-based lifeboat station, for example," Richmond Marine, supra, at 1221, the remedy is under the SIA.

The following cases specifically hold the following claims against the United States - none involving a vessel - cognizable under the SIA but not under the FTCA:

Negligence of Government employees in failing to require cargo to be unloaded when they discovered cargo temperatures higher than permitted by law; subsequent fire, Tankrederiet Gefion A/S v. United States, 241 F. Supp. 83 (E.D. Mich. 1964). Negligent failure of the Corps of Engineers to post signs warning of a dam, Beeler v. United States, 338 F.2d 687 (3rd Cir. 1964). Negligent failure of Corps of Engineers to remove obstruction from a river, Utzinger v. United States, 246 F. Supp.

1022 (S.D. Ohio 1965). Negligence of U. S. Marshal in causing a boat in his custody to collide with plaintiff's yacht, Tebbs v. Baker Whitely Towing Co., 227 F. Supp. 656 (D. Md. 1964). Sidewinder missile negligently released from Navy plane damages plaintiff's boat, T. J. Falgout Boats, Inc. v. United States, 361 F. Supp. 838 (C.D. Cal. 1972).

Expressly excepted from the operations of the Federal Tort Claims Act are all claims which can be brought under the Suits in Admiralty or Public Vessels Acts.[6/]

III. Plaintiff's Suit is Time-Barred.

This action is time-barred by the two-year limitation of the Suits in Admiralty Act, 46 U.S.C. 745, providing in pertinent part that "Suits as authorized by this chapter may be brought only within two years after the cause of action arises . . . ". (Emphasis supplied).

The adverb deserves emphasis. This "statute of limitation runs from the date of the injury" and is not tolled

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6/ 28 U.S.C. §2680 provides as follows:

> The provisions of this chapter and section 1346(b) of this title shall not apply to
>
> * * * * * *
>
> (d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

by filing of a claim administratively. McMahon v. United States, 342 U.S. 25, 27 (1951). "The fact that the limitation on actions is 'built-in' to the statute makes the time-bar a sharp jurisdictional limitation in suits not timely brought under the Act." American-Foreign Steamship Corporation v. United States, 291 F.2d 598, 603 (2d Cir. 1961) cert. den. 368 U.S. 895 (1961).

> The two year time-bar of the Suits in Admiralty Act is unlike a time-bar period prescribed under an ordinary Statute of Limitations. Under an ordinary time-bar statute a claim is not extinguished after the statutory period has elapsed. It is only unenforceable. The time-bar of the Suits in Admiralty Act renders a claim against the United States not only unenforceable, but extinguishes the claim itself, for when the sovereign, immune from suit, consented to be sued it was made a condition of the right to sue that suits so authorized had to be brought within the time-bar period.

(States Marine Corp. of Delaware v. United States, 283 F.2d 776, 778 (2d Cir. 1960).)

The "built-in" limitation of 46 U.S.C. §745 is a "limitation", Federal Commerce and Navigation Co. v. United States, 305 F. Supp. 1025, 1029 (S.D.N.Y. 1969), or a "restriction", Burch v. United States, 163 F. Supp. 476, 480 (E.D. Va. 1958) upon the jurisdiction of the Court to entertain the action. "[T]he two year time-bar period must be measured from the time of injury and not from the time of disallowance of the claim. . ., States Marine, supra, at 778-779, citing McMahon, supra. Burch, supra, at 480. "The bar of the statute of limitations of the Suits in Admiralty Act goes to jurisdiction and cannot be tolled or

waived." Falgout, supra, 361 F. Supp. at 842, aff'd., 508 F. 2d at 858.

CONCLUSION

For the foregoing reasons the order of dismissal entered by the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing instrument has been served upon counsel for all parties to this proceeding, by mailing the same to each by First Class United States Mail, properly addressed and postage prepaid on this date: